IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

THURSDAY, THE 27TH SEPTEMBER 2007 / 5TH ASWINA 1929

CRL.A.No. 1767 of 2003()

SC.558/1999 of ADDL.SESSIONS COURT (ADHOC), KASARAGOD
CP.189/1998 of JUDL. MAGISTRATE OF FIRST CLASS, KASARAGOD

.....

APPELLANT: ACCUSED

MUHAMMED HANEEF S/O. ALIKUNHI,
KUTIYAMOOLA HOUE, DHARMATHADUKA, BADOOR VILLAGE.

BY ADV. SRI.T.G.RAJENDRAN

RESPONDENTS: COMPLAINANT & STATE

---

1. THE SUB INSPECTOR OF POLICE,
MANJESHWAR.

2. STATE OF KERALA, REPRESENTED BY PUBLIC
PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY P.P.SRI.THOMS JOHN AMBOOKKAN FOR R2

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 27/09/2007, THE COURT ON 27/09/2007 DELIVERED THE FOLLOWING:

Crl.M.A.No. 11262/2003 in Crl.A.No. 1767/2003

Dismissed.

27-9-2007

Sd/-K. Thankappan,
Judge.

mn.

K.Thankappan,J.

- - - - - - - - - - - - - - - -

Crl.L.P.No. /2006

- - - - - - - - - - - - - - - -

Judgment

-12-2006

K. Thankappan, J.

- -

Crl. A. No. 1767 of 2003

- -

Dated this the 27th day of September, 2007

JUDGMENT

Appellant was found guilty under section 55(a) of the Abkari Act by the trial court. The case of the prosecution is that the appellant and three other accused were found transporting 22 cases of Original Coconut A.C. Special Fenny containing 1054 quarter bottles in a Maruthi Van bearing registration No.CKR 2056. Since other accused were absconding, the case against the appellant was split up and committed to the trial court.

2. The learned counsel for the appellant challenges the judgment under appeal on various grounds. The main ground urged by the learned counsel is that the trial court has committed serious error in finding that the appellant had committed an offence punishable under section 55(a) of the Abkari Act, as this Court had categorically held in Surendran V. State of Kerala (2004(1) KLT 404 and Sudhepan @ Aniyan V. State of Kerala (2005 (2) KLT (Cri) 631) to attract an offence under section 55(a) of the Abkari Act, the prosecution should allege prove that the possession of liquor was in connection with any export, import, transport or transit the same. The second ground urged by the learned counsel is that PW3 had not complied

with the provisions of the Abkari Act and the Kerala Excise Manual while detecting the offence and taking the sample. The other ground is that the sample and residue were not kept in the proper custody till they were produced before the court.

3. The prosecution case against the appellant and other accused as per the evidence of Pws.3 and 4 is that on getting information about transportation of Indian Made Foreign Liquor, they proceeded to the spot and started checking the vehicles. During that time a Maruthi Van bearing registration No. CKH 2056 came and on stopping the vehicle, four persons get down and attempted to escape. It is also stated that they were caught hold of and on inspection of the vehicle 1056 quarter bottles of Original Coconut AC Special Fenny in 22 cases were found. The further case of the prosecution is that on preparing Ext.P1 seizure mahazar, the contraband articles were seized, out of which two bottles were taken as sample for analysis. According to the prosecution, all the accused were arrested at the spot and they were produced before the police station along with the contraband articles. The further case is that the sample got analyzed and as per Ext.P4 chemical report, the sample contained 39.872% of ethyle alcohol. To prove the case against the appellant the prosecution examined Pws.3 and 4. Though PWs.1 and 2 were examined as eye witness to the

occurrence, they did not support the prosecution case and they were declared hostile to the prosecution.

4. Question to be considered is whether the finding entered by the trial court against the appellant is sustainable or not?

5. The prosecution case is that the appellant along with other were found transporting 1056 bottles of Original Coconut A.C. Special Fenny. Neither PW3 not PW4 stated that the contraband article was seized in connection with any import, export or transit of liquor. In Surendran 's case (Supra) a Division of this Court held that when a person is in "possession of illicit liquor" while illegally importing it, the case would be covered under section 55(a) of the Abkari Act. In Sudhepan @ Aniyan V. State of Kerala (2005(2) KLT (Cri) 631) , this Court held that under section 55(a) the prosecution must allege and prove that possession of the contraband liquor was incidental or in connection with export, import, transport or transit of liquor.

6. The evidence of PW3 would show that two bottles were taken as sample and all the accused were arrested, but the appellant alone faced trial. Before the trial court though PW3 stated that all the accused were transporting the contraband article in the vehicle, but neither PW3 nor PW4 stated that the contraband articles were transported from one place to

another within the State. The only allegation is that the accused were transporting the contraband article. The word "transporting" is defined both in section 3 of the Abkari Act as well as Rule 11 of Foreign Liquor Rules. Section 11 of the Foreign Liquor Rules deals with transport, which reads as follows:-

> "11. Transport: No quantity of foreign liquor in excess of quantity notified by the Government under section 10 and 13 of the Act shall be transported from one place to another within the Sate unless the same is covered by a transport permit issued by the Excise Inspector in charge of the Range of origin. A copy of such permit shall be forwarded by the Excise Inspector concerned to the Excise Inspector in charge of the Range to which the consignment is destined. The Excise Inspector at the destination shall verify the consignment on arrival and see that the quantity is duly credited in the accounts in case the transport is by a licensee.
>
> xxx xxx xxx xxx
>
> Provided also that a person can transport a quantity of foreign liquor not exceeding the quantity notified by the Government under section 10 and 13 of the Act without a transport permit issued by the authority concerned.

As per sub-section (18) of section 3 of the Abkari Act, transport means to move from one place to another within the State. If that be so, the evidence of Pws.3 and 4 is accepted, it can be seen that the accused were transporting the contraband articles in violation of Rule 11 of the Foreign Liquor Rules. As per the last proviso to Rule 1, a person can transport a

quantity of foreign liquor not exceeding the quantity notified by the Government under section 10 and 13 of the Act without a transport permit issued by the authority concerned. If that be so, the finding of the trial court that the appellant has committed an offence under section 55(a) of the Abkari Act is not legally sustainable.

7. As per evidence of Pws.3 and 4, the appellant and other accused were transporting the foreign liquor exceeding the quantity notified by the Government 10 and 13 of the the Abkari Act. PW3 though stated that 1056 quarter bottles of Coconut A.C. Special Fenny were seized, out of which two bottles were taken as sample for analysis. The sample and residue were produced before the court only on 27-4-1998. PW3 admitted that the samples were taken and labelled and sealed in the presence of independent witnesses. But when the samples were produced before the court, no seal or label is seen. As per Ext.P1 mahazar and Ext.P2 F.I.R. the properties seized were produced before the court. But, there is no record to show that the properties seized were produced before the court. No forwarding letter has been produced before the court. Apart from this neither PW3 nor PW4 has given any explanation for the non production of the contraband article before the court. There is no evidence to show that the sample and residue were kept in the property. In this context, PW3 stated that the contraband

article and the sample were entrusted with the Station House officer. He has not been examined before the court regarding the safe custody of the contraband article. In a decision reported in Narayani V. Excise Inspector (2002(3) KLT 725, this Court held that in the absence of any evidence to prove that residue and sample were kept in the proper custody till the date of producing the same before the court, the chance of tampering with the sample taken and the residue seized could not be ruled out. In the above circumstances, this Court has to consider the case set up by the appellant under section 313 Cr.P.C. The appellant had stated before the court that the case was foisted against him by the police. He also stated that he was the driver of the jeep and while he was waiting for his jeep, the police wanted to get his jeep. He refused to give the jeep and for that reason he was made an accused. The stand taken by the police that other accused persons who were arrested along with the appellant were absconded is doubtful. It is the case of Pws.3 and 4 accused were arrested and produced before the court. But there is no evidence regarding the circumstances under which the other accused were absconding.

8. In the above circumstances, this Court is of the view that the seizure of the contraband article as alleged by the prosecution is not proved beyond reasonable doubt. If that be so the benefit of doubt has to be given

to the appellant.

9. Hence, the conviction and sentence ordered against the appellant are set aside and the appellant is acquitted. The bail bond executed by the appellant shall stand cancelled.

The appeal is allowed as above.

K. Thankappan,
Judge.

mn

K. Thankappan,J.

- - - - - - - - - - - - - - - -

Crl.A. No. 1767 of 2003

- - - - - - - - - - - - - - - -

Judgment

27-9-2007